UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

IN RE:

ALEXANDER A. THOMAS,

Debtor.
_____/

CASE NO.: 18-10041-KKS
CHAPTER: 7

SHARRON CHIAPETTA,

Plaintiff,

v.

ALEXANDER A. THOMAS,

Defendant.
_____/

ADV. NO.: 18-01005-KKS

ORDER DISAPPROVING *STIPULATION FOR SETTLEMENT AND ORDER OF DISMISSAL* (DOC. 42)

THIS MATTER came before the Court for a continued hearing on November 14, 2019 on the *Stipulation for Settlement and Order of Dismissal* ("Settlement," Doc. 42). Based on argument of Plaintiff's counsel and testimony by the Defendant, for the reasons stated on the record at the hearing and as further articulated below, the Settlement falls below the standard of fairness, reasonableness or adequacy and is due to be disapproved.

BACKGROUND

Plaintiff commenced this Adversary Proceeding on June 4, 2018, seeking denial of Defendant's discharge under 11 U.S.C. § 727(a) of the Bankruptcy Code, and a determination that debt Defendant allegedly owes to Plaintiff under an alter ego theory is not dischargeable under 11 U.S.C. § 523.[1] Based upon Plaintiff's representations at a hearing on November 7, 2018, that this case would quickly resolve, the Court granted Plaintiff until December 1, 2018 to file a settlement agreement or stipulation and scheduled trial to take place on December 4, 2018.[2] Plaintiff did not file a settlement agreement or stipulation; meanwhile the Court granted the parties' consent motion to continue the December 4, 2018 trial and rescheduled the matter for a non-evidentiary status hearing.[3]

Between December 28, 2018 and July 2019, neither Plaintiff nor her counsel took any record action to move this Adversary Proceeding to trial. Instead, Plaintiff filed an additional motion requesting a continuance and failed to appear at at least one status hearing, forcing the Court

[1] Doc. 1.
[2] Doc. 12.
[3] Docs. 14 & 15.

to issue two separate Orders to Show Cause why this Adversary Proceeding should not be dismissed.[4]

On July 31, 2019, Plaintiff filed the Settlement, which was heard on a preliminary basis on October 3, 2019, along with a companion Reaffirmation Agreement filed in Defendant's administrative bankruptcy case in accordance with the terms of the Settlement.[5] At the preliminary hearing on the Settlement the Court had questions about whether and why the Settlement, as verbally outlined, should be approved. The Court directed Plaintiff's counsel to file a memorandum of law in support of the Settlement by November 1, 2019 and scheduled a status hearing for November 14, 2019.[6] Plaintiff's counsel did not file the memorandum.

The Court conducted the status hearing on November 14, 2019 in conjunction with a hearing on reaffirmation in Defendant's administrative case. At the hearing, the Court disapproved the Reaffirmation Agreement, finding that 1) it was not in the best interest of the Debtor/Defendant, and 2) Plaintiff failed to present sufficient justification for approving the Reaffirmation Agreement.[7] The Court did not specifically announce

[4] Docs. 18, 25, and 52.
[5] Doc. 57; *In re Thomas*, Case No.: 18-10041-KKS, Doc. 34 (Bankr. N.D. Fla. July 31, 2019).
[6] Doc. 57.
[7] *In re Thomas*, Case No.: 18-10041-KKS, Doc. 53 (Bankr. N.D. Fla. Nov. 19, 2019).

disapproval of the Settlement at the hearing, but disapproval was implicit when the Court disapproved the Reaffirmation Agreement with Plaintiff, since that was, in essence, the heart of the Settlement. For the same reasons announced in open court at the hearing on November 14, 2019, and as further set forth below, the Settlement is due to be disapproved.

DISCUSSION

Courts are to look at "the fairness, reasonableness and adequacy of a proposed settlement agreement."[8] To determine whether a settlement agreement is fair, reasonable, and adequate, the Eleventh Circuit Court of Appeals adopted a four-factor test: "(a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the manner of collection; (c) the complexity of the litigation involved and the expense, inconvenience, and delay necessary in attending it; and (d) the paramount interest of the creditors and a proper deference to their reasonable

[8] *In re Chira,* 567 F.3d 1307, 1312-13 (11th Cir. 2009)(citing *Martin v. Kane (In re A&C Prop.),* 784 F.2d 1377, 1381 (9th Cir. 1986)).

views in the premises."[9] A bankruptcy court's role in reviewing a settlement is "to canvass the issues" and determine whether the settlement falls "below the lowest point in the range of reasonableness."[10]

Here, the Settlement falls below the lowest point in the range of reasonableness. All four of the *Justice Oaks* factors weigh against approval of this Settlement. As to the first factor, based on the Complaint alone the probability of Plaintiff's success in litigation appears very low. The attachments to the Complaint show no contractual liability from Defendant to Plaintiff; instead, the Complaint sets forth a bare-bones claim that Defendant is liable for corporate debt as the corporation's alter ego:

> The Debtor, along with his brother, in their operation of their businesses, operated them as alter egos, seeking to shield themselves from personal liability while at the same time using funds of these businesses for personal purposes.[11]

Plaintiff alleges no facts in support of this claim, and no additional facts to show that Defendant is personally liable for the debt. Plaintiff has submitted nothing other than its Complaint in support of its alter ego based

[9] *In re Justice Oaks II, Ltd.,* 898 F.2d 1544, 1549 (11th Cir. 1990) (citing *Martin v. Kane (In re A & C Properties),* 784 F.2d 1377, 1381 (9th Cir. 1986) (citations omitted)).
[10] *In re Pullum,* 598 B.R. 489, 492 (Bankr. N.D. Fla. 2019) (citing *In re W.T. Grant Co.,* 699 F.2d 599, 608 (2d Cir. 1983)).
[11] Doc. 1, ¶ 29.

claims. For these reasons alone, the probability of success weighs in favor of Defendant, and against approving the Settlement.

As to the second factor, the difficulties of collection, Defendant testified that he is currently unemployed, and his job prospects are being adversely impacted by his bankruptcy case. The Settlement calls for Defendant to reaffirm an *unsecured* debt of $365,000 and make monthly payments of $150 for 15 years. But, $150.00 per month equals only $1,800 per year. If Defendant paid Plaintiff $150.00 per month for fifteen (15) years, he would only pay $27,000. To amortize $365,000 by making $150.00 monthly payments, Defendant would have to make payments for the rest of his life, and then longer. Such a result is preposterous; especially where Plaintiff has proffered no facts or evidence in support of its claim.

As to the third factor, the complexity of litigation, proving an alter ego claim can be difficult, expensive and result in lengthy litigation. Nothing here gives the Court the slightest indication that Plaintiff has any facts at all in support of its alter ego claim, and due to the apparent lack of discovery to date, it appears that going to trial will be difficult and expensive, at a minimum.

The fourth factor, the paramount interest of this creditor based on her "reasonable" views also weighs against approval of the Settlement. Plaintiff has shown nothing to demonstrate that her view of this case is reasonable.

From the inception of this Adversary Proceeding, Plaintiff has done nothing to pursue its claims other than try to force the unrepresented Defendant into a settlement. At one point, the Court entered an Order to Show Cause ("OTSC") why this Adversary Proceeding should not be dismissed due to Defendant's failure to file a response to the Complaint.[12] In response to that OTSC filed in March of 2019, Plaintiff requested the Court to enter an order "setting the case for Trial [sic] in thirty (30) days and disallowing the parties to continue the case beyond that date."[13]

After numerous continuances and second and third chances for Plaintiff's counsel to move this case along, the Court entered an order scheduling the case for trial (again) and setting discovery and other deadlines.[14] Having further delayed preparing for trial, Plaintiff's counsel

[12] Doc. 25.
[13] *Response to the Court's Order to Show Cause,* Doc. 34.
[14] Doc. 62. That Order set December 16, 2019 as the deadline to "complete all fact discovery." Plaintiff *initiated* discovery by serving her first set of Interrogatories on the day of the deadline to *complete* discovery. Doc. 65. Defendant alleges that Plaintiff's counsel emailed Defendant the evening before the Court-imposed discovery deadlines, requesting pages of discovery and for Defendant to consent to a continuance of the trial. Doc. 67.

seeks yet again to continue the trial and to withdraw.[15] Counsel has also filed a Motion for Summary Judgment supported by no facts or documents in addition to those set forth in the Complaint, other than unsigned answers to interrogatories, most of which deny the facts alleged and all of which were apparently delivered to Plaintiff's counsel quickly and under duress.[16] There is still not one single fact before the Court that supports Plaintiff's Complaint, either on the basis of Section 523 or 727.

For the reasons stated, it is

ORDERED: The *Stipulation for Settlement and Order of Dismissal* (Doc. 42) is DISAPPROVED.

DONE and ORDERED on January 23, 2020, *nunc pro tunc* to November 14, 2019.

KAREN K. SPECIE
Chief U.S. Bankruptcy Judge

cc: All interested parties.

Attorney for Plaintiff is directed to serve a copy of this Order on interested parties and file a certificate of service within three (3) business days of entry of this Order.

[15] Docs. 68 and 69.
[16] Doc. 70.